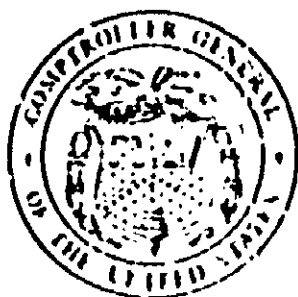


7409 J. Cohen
Proc I

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-191950

DATE: August 18, 1978

MATTER OF: M & H Mfg. Co., Inc.

DIGEST:

1. Protest that IFB rather than RFP should have been issued is untimely and will not be considered on merits, since it was not filed prior to date for receipt of initial proposals.
2. It is not GAO practice pursuant to bid protest function to conduct investigation for purpose of establishing validity of protester's speculative statements. Rather, protester has burden to affirmatively prove its case. Where allegations of impropriety in conduct of procurement are not supported in record, protester has not met burden of proof and protest must be denied.
3. Protest against conduct of preaward survey of initial low offeror prior to receipt of best and final offers is denied, since other offerors were not prejudiced thereby.

Request for proposals (RFP) No. DAAK10-78-R-0039, was issued on March 13, 1978, by the United States Army Armament Research and Development Command for certain metallic and nonmetallic hardware. Offers were received by the closing date, April 10. The price submitted by the low offeror, Mesalic Tool & Machine Co. (Mesalic), was 21 percent lower than that of the next low offeror, M & H Mfg. Co., Inc. (M & H). The contract negotiator therefore requested verification from Mesalic in accordance with Armed Services Procurement Regulation (ASPR) § 3-805.5(d)(1) (DPC 76-7, April 29, 1977), which provides in part:

"(d) If it is contemplated that award will be made without discussions * * * then the following procedures shall be followed.

"(1) If the contracting officer suspects a mistake, he shall advise the offeror and request verification. * * *"

In response to the contract negotiator's request, Mesalic alleged that in preparing its proposal it misunderstood a vendor's quote, and would have to revise its offer by adding \$170,000 to the price. Therefore, and pursuant to ASPR § 3-805, (d)(3) all offerors were afforded the opportunity to revise their proposals and submit best and final offers. The regulation provides in pertinent part:

"If an offeror requests permission to correct a mistake in his proposal, a determination permitting the correction may be made * * *. If * * * establishing the mistake and the intended proposal requires reference to documents, worksheets, or other data outside the solicitation and the proposal, then the correction of such a mistake may be accomplished only through the conduct of discussions with offerors * * *."

At the same time, a preaward survey of the Mesalic facility was initiated.

Best and final offers were due on April 28. Mesalic, however, withdrew from the competition rather than revise its offer. The preaward survey was therefore discontinued. In the best and final offers, M & H increased its price slightly, and the firm that initially was third low considerably reduced its offer, thereby becoming the low offeror. Award of a contract under the RFP to that firm is contemplated.

M & H has protested the proposed award. M & H first argues that, since award was to be

based on the lowest price, a formally advertised solicitation rather than an RFP should have been issued. In addition, the protester contends that the contracting officer was biased against M & H. M & H argues that once Mesalic withdrew its proposal award should have been based on the initial offers, but that best and final offers were requested when it became evident that otherwise M & H would be in line for the contract award. M & H also suspects that, when best and final offers were solicited, its initial price was disclosed to the third low offeror, since that firm "coincidentally" revised its price downward just enough to displace M & H. The protester has presented no probative evidence in support of its position, but contends that an independent investigation by our Office would substantiate its allegation.

Finally, M & H questions the need for a preaward survey of Mesalic before best and final offers were received.

Concerning the type of solicitation issued, section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1977), requires that protests based upon alleged improprieties in an RFP which are apparent prior to the closing date for the receipt of initial proposals must be filed by that date. The protest was filed in our Office on May 12. Since initial proposals were due on April 10, the protest on that issue is untimely and will not be considered on the merits.

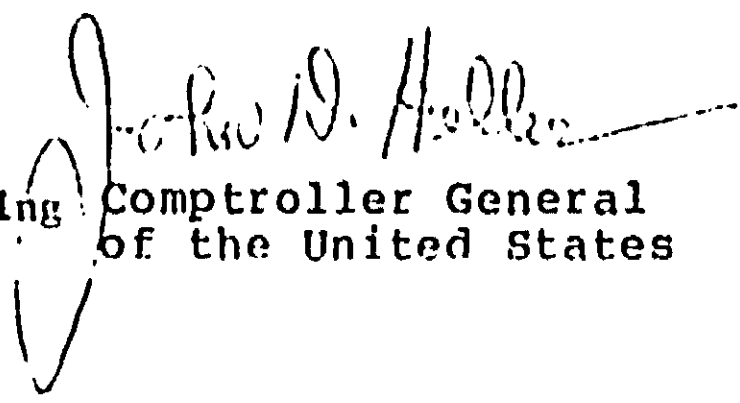
Regarding M & H's belief that an investigation by our Office would substantiate its suggestions of impropriety in the conduct of the procurement, it is not the practice of our Office to conduct an investigation pursuant to our bid protest function for the purpose of establishing the validity of a protester's statements. Fire & Technical Equipment Corp., B-191766, June 6, 1978, 78-1 CPD 415. Rather, the protester has the burden to affirmatively prove its case. Reliable Maintenance Service, Inc., -request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337.

As M & H recognizes, there is no evidence in the record before our Office to support M & H's allegations. To the contrary, in view of ASPR § 3-805.5(d)(1) and (3), it appears that the Army's actions with respect to Mesalic and the request for best and final offers were entirely proper. We note here that in a negotiated procurement, offerors are free to revise their proposals, including price, in response to a request for best and final offers. In fact, it is not uncommon for an offeror to withhold its lowest price until responding to such request. See Fordel Films, Inc., B-186841, October 29, 1976, 76-2 CPD 370. Thus, the mere fact that the successful offeror reduces its price in the course of making its best and final offer is insufficient to establish that another offeror's price has been revealed. Nuclear Research Corporation, B-189790, February 22, 1978, 78-1 CFC 147.

Accordingly, in the absence of probative evidence, we must assume that the protester's allegations concerning this issue are speculative, and conclude that M & H has not met its burden of proof.

Finally, we do not see how M & H could have been prejudiced by the initiation of a preaward survey of Mesalic prior to the receipt of best and final offers.

The protest is denied.


Acting Comptroller General
of the United States